No. 01-1623

In the Supreme Court of the United States

IN RE PHILIP ALAN WISCHKAEMPER AND GARY A. TAYLOR, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings.

2. Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in successor post-conviction proceedings.

3. Whether a district court may summarily order appointed counsel to return counsel fees previously approved and paid to him.

4. Whether a court of appeals may decide an appeal without prior briefing by the appellant.

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This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Odell Barnes was convicted of murder in a Texas state court and sentenced to death. See Pet. 2. Following state post-conviction proceedings, and pursuant to 21 U.S.C. 848(q), the United States District Court for the Northern District of Texas appointed petitioners Philip Wischkaemper and Gary A. Taylor to represent Barnes in federal habeas corpus proceedings under 28 U.S.C. 2254. Pet. 2; Pet. App. 18a. Petitioners filed a habeas petition on his behalf. The district court denied the petition, and the district court and the court of appeals declined to issue a certificate of appealability. See *Barnes* v. *Johnson*, 184 F.3d 816 (5th Cir. 1999)

(Table); Pet. App. 27a-28a. This Court denied review. See *Barnes* v. *Johnson*, 528 U.S. 974 (1999).

Petitioners then filed a clemency application with the Texas Board of Pardons and Paroles, which denied the petition. See Pet. 2-3. Petitioners also sought leave to file a successor petition for post-conviction relief in the state courts, but the Texas Court of Criminal Appeals denied leave to file the petition. See Pet. 3-4.

On February 25, 2000, the United States Court of Appeals for the Fifth Circuit denied petitioners' request to file a successor federal habeas corpus petition on Barnes's behalf. See Pet. 4. Petitioners also filed an original petition for a writ of habeas corpus in this Court and applied for a stay of execution. See Pet. for Writ of Habeas Corpus as Original Matter at 3, *In re Barnes*, No. 99-8449 (filed Feb. 26, 2000). On March 1, 2002, this Court denied the petition and the application for a stay of execution. See *In re Barnes*, 529 U.S. 1001 (2000). Barnes was later executed. See Pet. App. 3a.

2. Petitioners submitted vouchers to the court of appeals in which they sought compensation for their representation of Barnes. See Pet. App. 13a-16a. The court approved payments to petitioners for fees and expenses for the period beginning with the filing of the notice of appeal and ending with the filing of the petition for a writ of certiorari in this Court, and directed petitioners to submit claims related to the clemency proceeding to the district court. See *id.* at 22a (approving payment of $6,287.50 to Wischkaemper); 6/20/00 Letter from Anthony Bonfanti, Senior Staff Attorney, to Taylor (approving $11,340.12 payment).

Wischkaemper submitted his claim for fees and expenses to the district court, which initially approved a payment of $4,995.46. See Pet. App. 6a, 23a-24a, 28a. Taylor then submitted his claim, which sought only

reimbursement for copying costs incurred during the clemency proceeding. See *id.* at 25a-26a; 2/7/01 Letter from Taylor to Deputy District Court Clerk Kristy Weinheimer. On April 9, 2001, relying on *Chambers* v. *Johnson*, 133 F. Supp. 2d 931, 935-936 (E.D. Tex. 2001), the district court entered an order in which it denied Taylor's request for compensation and reimbursement, vacated its earlier approval of Wischkaemper's fees and expenses, and directed Wischkaemper to refund $4,522.50 in fees and $472.96 in expenses. See Pet. App. 5a-7a, 28a-29a.

3. Petitioners appealed. See Pet. App. 29a. On July 20, 2001, the court of appeals dismissed the appeal for want of jurisdiction. See *id.* at 3a-4a. Petitioners moved for reconsideration. See *id.* at 31a-32a. Petitioners later filed a motion asking the court to vacate its July 20, 2001, order and to reinstate the appeal, or alternatively to clarify the procedural status of the case. See Motion to Vacate and Reinstate Appeal and in the Alternative for Clarification (Oct. 1, 2001). That motion noted that the court had asked for briefing on the jurisdictional issue in *Clark* v. *Johnson*, No. 01-10573, that the court's decision on that issue would be controlling law in the circuit, and that the previously-filed motion for reconsideration was, and was intended to be, a petition for rehearing. See *id.* at 1-4.[1]

On November 20, 2001, the court of appeals granted the motion for clarification. The court stated that it

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[1] *Clark* v. *Johnson*, No. 01-10573, involved petitioner Taylor's request for compensation for his representation of another capital habeas petitioner, Jack Wade Clark, in state clemency proceedings. The ruling of the court of appeals in that case is the subject of the petition for a writ of certiorari in *In re Taylor*, No. 01-1605 (filed Apr. 25, 2002).

was treating the motion for reconsideration as a timely petition for panel rehearing, and that all pending motions would be held pending the court's decision in *Clark* v. *Johnson*, No. 01-10573.

On January 4, 2002, following the court's decision in *Clark* v. *Johnson*, 278 F.3d 459 (5th Cir. 2002), petition for cert. pending *sub. nom. In re Taylor*, No. 01-1605 (filed Apr. 25, 2002), the court granted the motion for reconsideration, vacated its order of July 20, 2001, and reinstated petitioners' appeal. See Pet. App. 1a-2a. The court explained that, in ruling on Taylor's request for compensation in *Clark* v. *Johnson*, 278 F.3d at 460-461, the court concluded that it had appellate jurisdiction over an appeal from a district court order denying compensation under Section 848(q)(4)(B). Pet. App. 2a.

In addition, relying on its decision in *Clark*, 278 F.3d at 461-463, the court held that the district court had correctly concluded that Section 848(q)(8) did not authorize compensation for attorneys in state clemency proceedings. See Pet. App. 2a. The court therefore affirmed the lower court's order denying compensation. See *ibid.*

Petitioners filed a petition for rehearing en banc, which raised two issues: (1) whether Section 848(q) provides capital habeas corpus petitioners the right to appointed counsel in state clemency proceedings; and (2) whether, if appointed counsel has been paid for services in a state clemency proceeding, the district court may order counsel to reimburse the government. See Pet. for Reh'g En Banc 1 (filed Jan. 16, 2002). Petitioners contended that Section 848(q) obligated appointed counsel to pursue clemency proceedings (see *id.* at 4-9); that the issue was exceptionally important (see *id.* at 9-13); and that the district court's order that

Wischkaemper return the fees previously paid to him violated his right to procedural due process (see *id.* at 13-15). On February 5, 2002, the court of appeals denied the petition for rehearing. See Pet. App. 8a-9a.

DISCUSSION

This Court should deny the petition for a writ of certiorari. The principal question presented by the petition (Pet. 7-19) is whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings. The same issue is presented by the petition in *In re Taylor*, No. 01-1605 (filed Apr. 25, 2002), and petitioners here advance essentially the same arguments on that question as the petitioners in that case. At the invitation of this Court, the United States has filed a brief amicus curiae in *In re Taylor*, in which the government expresses the view that this Court's review is not warranted. As explained more fully in that brief, and summarized below, the Fifth Circuit has correctly held that Section 848(q) does not authorize federally appointed and funded counsel to represent state prisoners in state clemency proceedings, and its decision does not directly conflict with any decision of another court of appeals or of this Court.[2]

The additional questions presented by the petition in this case also do not warrant the Court's review. Petitioners did not raise in the court below their claim (Pet. 19-23) that Section 848(q) authorizes federally appointed and funded counsel to represent state prisoners in successor collateral review proceedings, so that claim is not properly before this Court. The contention (Pet.

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[2] The government has served counsel in this case with a copy of the amicus brief that the government has filed in *In re Taylor*.

23-25) that the district court erred by ordering Wischkaemper to repay attorneys' fees and expenses without notice or a hearing was not raised in the district court, lacks merit, and is not of sufficient general importance to warrant this Court's review. Finally, petitioners' claim (Pet. 25-29) that the court of appeals erred by initially dismissing their appeal *sua sponte* for want of jurisdiction and later affirming the district court's denial of compensation before briefing on the merits is not properly presented, lacks merit, and is too case-specific to warrant this Court's review.

A. This Court's Review Is Not Warranted To Decide Whether Section 848(q) Authorizes Federally Appointed And Funded Counsel To Represent State Prisoners In State Clemency Proceedings

As explained more fully in the government's brief in *In re Taylor*, petitioners' contention (Pet. 7-10) that 21 U.S.C. 848(q)(8) provides for federally appointed and funded counsel to represent state prisoners in state clemency proceedings is incorrect. The other provisions of Section 848(q) make clear that the statute is concerned only with appointment and compensation of counsel in *federal* proceedings, and Section 848(q)(8) must be understood in that context. In particular, Section 848(q)(8) refers to counsel appointed pursuant to Section 848(q)(4). Section 848(q)(4)(A) is implicitly limited to federal proceedings, and Section 848(q)(4)(B), the provision under which petitioners were appointed, is expressly limited to federal proceedings. Section 848(q)(4)(A) mandates appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable by death." 21 U.S.C. 848(q)(4)(A). That provision is obviously limited to *federal* criminal actions

because it is inconceivable that Congress intended for the federal courts to appoint, and the federal government to fund, counsel in state court trials and direct appeals. Section 848(q)(4)(B) authorizes appointment of counsel to represent indigent prisoners who pursue collateral relief under 28 U.S.C. 2254 and 2255—both of which concern *federal* proceedings.

Construing Section 848(q) as limited to federal proceedings also accords with the well settled principle that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). Petitioners' broad reading of Section 848(q) would mean that Congress, with no discussion, has, for the first time ever, authorized the federal courts to appoint, and the federal government to fund, counsel to pursue state remedies in state clemency proceedings.

A narrow construction of Section 848(q) also respects federalism principles. If federal courts were to appoint and to supervise, and the federal government were to fund, counsel to pursue state remedies on behalf of state prisoners in state courts, there would be a significant risk of federal intrusion into and interference with the state judicial process. Congress would not so dramatically alter the federal-state balance without clearly expressing its intent to do so. See, *e.g.*, *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1007 (2002). The court of appeals was therefore correct to reject petitioners' construction of Section 848(q).

Contrary to petitioners' contention (Pet. 10-13), the court of appeals' ruling does not conflict with the decision of the Eighth Circuit in *Hill* v. *Lockhart*, 992 F.2d 801 (1993). The court of appeals in *Hill affirmed* the district court's *denial* of compensation to the counsel-claimant. *Id.* at 803-804. Although the court

construed Section 848(q) to permit compensation for representation in state proceedings under certain conditions, the court was interpreting an earlier version of Section 848(q), and it is not clear that the court would reach the same result if faced with the current statute. Moreover, it appears that petitioners would not be entitled to compensation under the Eighth Circuit's approach. As far as the government is aware, petitioners did not request compensation before they represented Barnes in the clemency proceedings, and prior authorization is one of the conditions on compensation that the court established in *Hill*.

Nor does the court of appeals' decision "run[] counter" (Pet. 13) to *McFarland* v. *Scott*, 512 U.S. 849 (1994). *McFarland* did not address whether Section 848(q) authorizes federally appointed counsel to represent state prisoners in state proceedings. *McFarland* held only that a state capital defendant may invoke his right under Section 848(q)(4)(B) to appointed counsel in *federal* habeas corpus proceedings before filing a full, formal habeas petition by moving for the appointment of habeas counsel, and that a district court may enter a stay of execution to permit that invocation. 512 U.S. at 859.

B. The Question Whether Section 848(q) Authorizes Federally Appointed And Funded Counsel To Represent Prisoners In Successor Collateral Review Proceedings Is Not Properly Before This Court

Petitioners incorrectly contend (Pet. 19-23) that this Court's review is warranted to ensure that counsel is compensated for pursuing all available post-conviction remedies, including the kind of successor petitions that they filed in the underlying case. That question is not properly before this Court. Petitioners have with-

drawn any claim to compensation for representation solely related to the successor petitions that they filed. See Pet. 4-5 n.1. In addition, they have conceded that they did not seek such compensation in the courts below, and that those courts did not specifically address the issue of such compensation. See Pet. 19. In those circumstances, there is no reason for this Court to depart from its usual practice of not entertaining claims that were not pressed or passed on below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

On the merits, the government agrees that Section 848(q) authorizes compensation for representation in connection with the filing of successive *federal* habeas corpus petitions that are arguably meritorious. For the reasons set forth above (and in the government's amicus brief in *In re Taylor*) concerning representation in state clemency proceedings, however, the government does not believe that Section 848(q) authorizes compensation for representation in connection with successive *state* petitions for post-conviction relief.

C. The District Court Did Not Commit Plain Error By Ordering That Wischkaemper Refund Fees And Expenses The Court Had Previously Incorrectly Approved

Petitioner Wischkaemper also mistakenly contends (Pet. 23-25) that the district court erred in ordering him to refund the fees and expenses that it had previously approved without first providing him notice and an opportunity to be heard. As an initial matter, that case-specific contention is not of sufficient general impor-

tance to warrant this Court's review. The claim also lacks merit.

There is no indication in either the petition or its appendix that Wischkaemper raised his procedural due process claim in the district court. Although Wischkaemper could not have raised a due process objection before the district court's action, he could have raised that claim in a motion for reconsideration, and his failure to do so means that the claim may be reviewed, if at all, only for plain error. Cf. *Conley* v. *Board of Trs. of Grenada County Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983) (procedural objection to *sua sponte* grant of summary judgment is reviewed only for plain error if party against whom judgment is entered did not move for reconsideration). See generally *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."); *Dixon* v. *Edwards*, 290 F.3d 699, 719 (4th Cir. 2002) ("We should not, unless an error is plain, or unless our refusal to address an appeal would result in a fundamental miscarriage of justice, ordinarily consider an issue which is first raised on appeal."); *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995) ("In the absence of a party's preservation of an assigned error for appeal, we review only for plain error.").

As this Court has explained in applying the plain error doctrine in the criminal context, reversal for plain error is warranted only when the district court committed an obvious error that "affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). That did not occur in this case.

The district court's summary procedure did not affect Wischkaemper's substantial rights. For the reasons described above and in the government's brief in *In re Taylor*, Section 848(q) does not entitle him to compensation for representing a state prisoner in state proceedings. Because Wischkaemper's claim to the money that the district court ordered him to return would have failed even if he had been accorded a hearing, the court's failure to conduct a hearing before ordering its return, if it was error at all, did not affect his substantial rights.

In addition, the procedure employed by the district court did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. It is well established that courts may modify their judgments on their own initiative. See, *e.g.*, *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam). Further, Wischkaemper was on notice that the district court might conduct a post-audit review of his claim for fees and expenses. As the district court noted in the related *Soria* litigation, the instructions provided by the Fifth Circuit for completing worksheets to be attached to each reimbursement voucher provide that:

> All payments made pursuant to this claim are subject to post-audit; contemporaneous time and attendance records as well as expense records must be maintained for three years after approval of the final voucher. * * * Any overpayments are subject to collection, including deduction of amounts due from future vouchers.

Order to Show Cause at 2, *Soria* v. *Johnson*, Civil Action No. 4:98-CV-1067-C (N.D. Tex. Nov. 3, 2000).[3]

Wischkaemper suggests that the district court was unaware of the arguments why he was not required to refund payments received for representation in state clemency proceedings. But counsel in *Soria* v. *Johnson*, who included petitioner Taylor, provided the court with extensive argument on that issue. See Response to Show-Cause Order Relating to Attorneys Fees With Supporting Brief at 6-14, *Soria* v. *Johnson*, Civil Action No. 4:98-CV-1067-C (N.D. Tex. filed Nov. 22, 2000). If there were additional arguments to be made, Wischkaemper could have presented them to the district court in a motion for reconsideration, and he presumably did present them to the court of appeals in his petition for rehearing.

Under those circumstances, Wischkaemper is not entitled to any relief on his due process claim. Cf. *Ross* v. *University of Tex. at San Antonio*, 139 F.3d 521, 527 (5th Cir. 1998) (rejecting appellate challenge to district court's failure to provide notice before granting summary judgment because any additional evidence that might have been presented was reviewed by the appellate court and did not raise a genuine issue of material fact); *In re Weinstein*, 164 F.3d 677, 686-687 (1st Cir.) (rejecting due process challenge to bankruptcy court's *sua sponte* reversal of earlier decision where (1) aggrieved party had presented principal arguments to bankruptcy court before earlier decision; (2) aggrieved party could have raised issue in motion for reconsideration; and (3) appellate court gave full

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[3] The *Soria* litigation is the subject of the petition in *In re Taylor*, which, as discussed above, also raises the first question presented by this case, but does not raise any due process issue.

consideration to arguments), cert. denied, 527 U.S. 1036 (1999).

D. The Court Of Appeals Did Not Err In Summarily Resolving Petitioners' Appeal

Petitioners also contend (Pet. 25-29) that the court of appeals erred when it decided the merits of their appeal without permitting them to file a brief or otherwise identify the issues presented in the appeal. That case-specific contention is not of sufficient general importance to warrant this Court's review, is not properly before the Court, and lacks merit in any event.

There is no indication in either the petition or its appendix that petitioners raised that claim in the court of appeals. As a result, there is no reason for the Court to depart from its usual practice of not entertaining claims that were not pressed or passed on below. See, *e.g.*, *Zobrest*, 509 U.S. at 8; *Lovasco*, 431 U.S. at 788 n.7; *Adickes*, 398 U.S. at 147 n.2.

Petitioners' claim would lack merit even if it were properly presented. Their contention that the court of appeals acted improperly in its initial dismissal of their appeal has no bearing on the eventual judgment since the court of appeals granted panel rehearing and entertained the merits of their appeal. There is also no merit to petitioners' claim that the court of appeals erred in summarily affirming the district court on the merits after the court of appeals concluded, on reconsideration, that it had jurisdiction over petitioners' appeal. Although the court affirmed the district court's judgment without merits briefing, petitioners were able to present their views in detail to the court of appeals in their petition for rehearing. As a result, any error in the procedure followed by the court of appeals was harmless. See Fed. R. Civ. P. 61; cf. Fed. R. Crim. P.

52(a). In any event, petitioners identify no provision of the Federal Rules of Appellate Procedure that mandates merits briefing in every case. Indeed, this Court itself not infrequently decides cases without full merits briefing. See Sup. Ct. R. 16.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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